Systrand Manufacturing Corp. *and* Interior Systems, Local 1045, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Petitioner. Case 7–RC–21446

June 24, 1999

DECISION AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered challenges and objections to an election held on December 17, 1998, and the hearing officer's report recommending disposition of them.[1] The revised tally of ballots shows 81 for and 78 against the Petitioner, with 5 challenged ballots, a sufficient number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings[2] and recommendations.[3] We shall remand this matter to the Regional Director to take such action consistent with this Decision and Direction.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 7 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Ruth Elliot, Cheryl Luna, Roseanne Richards, Richard Block, and Mohsen Saleh. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

MEMBER HURTGEN, concurring in part, dissenting in part.

I agree with the hearing officer that challenged voters Ruth Elliot, Cheryl Luna, Roseanne Richards, Richard Block, and Mohsen Saleh share a sufficient community of interest with other unit employees to warrant their inclusion in the unit. Accordingly, I would overrule the challenges to their ballots and direct that a revised tally of ballots issue.

Contrary to my colleagues, however, if that revised tally discloses that a majority of eligible votes have been cast for the Union, I would sustain the Employer's objection, set aside the election, and direct a second election.

The Employer's objection states that the Union interfered with the election by distributing to employees a facsimile of the official sample ballot, defaced with the "YES" box checked. The Employer argues that the conduct gave employees the misleading impression that the Board supported the Union or was encouraging voters to vote for the Union.

The evidence establishes that, 10 days before the election and again on the day before voting, union representatives distributed to unit employees a total of about 240 English and Spanish facsimile sample ballots, with the "YES" box checked. These duplicated ballots did not disclose that the Union was responsible for the "Yes" markings. Neither did these ballots indicate that the Board was not responsible for the markings or, indeed, that the Board did not support the Union. To be sure, some official Board election notices posted in the Employer's facility *did* affirmatively disclaim Board involvement in any altering of these notices or sample ballots. However, this was true only with respect to English-language notices. The official Spanish-trans-lation notices did not contain this disclaimer.[1]

Under these facts, I am concerned about the danger that employees would be mislead into believing that the Board supported the Union. I recognize that the Union identified itself when distributing the sample ballots, and that the Union simultaneously handed out partisan union literature. However, this is not the same as having a clear disclaimer, *on the face of the defaced ballot*, that the union (or employer as the case may be) is the party who is responsible for the defacement. Thus, in order to have a "bright line" test, and in order to protect the Board's vital interest in preserving its actual and perceived neutrality, I would require such a disclaimer on the face of any defaced sample ballots.[2]

The Board currently places the disclaimer on the official posted notice.[3] And, that notice says that defacements on any sample ballot are not those of the Board. However, in my view, it is far preferable to have the disclaimer on the face of the defaced sample ballot.[4] Such a

[1] The pertinent portion of the hearing officer's report is attached as an Appendix.

[2] The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] In dissent, our colleague seeks to establish a new "bright line" test in which he would require that an altered Board ballot circulated as election campaign propaganda must contain on its face a disclaimer of Board involvement (or, alternatively, that the defacer says that it is responsible for the sample ballot). We decline to modify well-developed Board precedent with respect to the use of altered or defaced sample ballots as election propaganda. We find that the hearing officer appropriately applied the Board's two-part analysis set out in *SDC Investments*, 274 NLRB 557 (1985), in determining that the Union's distribution of marked sample ballots was not objectionable because employees receiving these documents could readily conclude that they came from the Petitioner. Under these circumstances, the ballots were not likely to mislead employees into assuming that the Board endorsed the Petitioner. We further find no objective record basis for the dissent's general observations about the Employer's Spanish-speaking employees' ability to understand the Board's electoral process.

[1] The Spanish-translation posted notice merely stated that "This is the only official notice and must not be defaced by anyone."

[2] Alternatively, the defacer can say that it is responsible for the sample ballot.

[3] *Brookville Healthcare Center,* 312 NLRB 594 (1993).

[4] To the extent that *Comcast Cablevision of New Haven,* 325 NLRB 833 fn. 2 (1998), is inconsistent with the above, I respectfully disagree with it.

requirement would not be onerous. A simple copying of the posted notice (with its disclaimer) would suffice.

In any event, in the instant case, even the posted Spanish notice failed to contain the disclaimer. Thus, even if a posted disclaimer would "save" a sample ballot not containing a disclaimer, that would not "save" the sample ballot distributed to the Employer's Spanish-speaking employees, because the Spanish notice posted contained no disclaimer. This group, not being familiar with our language and political system, can easily be confused about the Board's role in the election.[5]

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

At the hearing the parties entered into factual stipulations regarding the objection. The parties stipulated that Petitioner Representatives Edward Musser, Jose Herrara, and Pat Raquepaw, agents of the Petitioner, appeared at the Employer's facility in Brownstown, Michigan on December 8, 1998, from approximately 5:15 to 6:15 a.m. (during shift change). At the plant gates they distributed two documents to employees. The first was a document titled "Contract" that had a Spanish version on one side and an English version on the other. The document extolled the virtues of a collective-bargaining agreement for employees. It does not make reference to the Petitioner by name. The parties also stipulated that at the same time they distributed "Contract," Musser, Herrara, and Raquepaw also distributed a copy of a sample NLRB ballot with an English version on one side and a Spanish version on the other (attachments A and B) [omitted from publication]. The sample ballot on both versions had an "X" marked in the "yes" box. The parties also stipulated that about 120 copies of the above documents were distributed.

The parties also stipulated that on December 16, 1998, Musser, Herrara, and Raquepaw appeared at the Employer's facility from approximately 5:15 to 6:30 p.m., again during shift change, and distributed a document titled "A Pray [sic] for Justice." They also distributed a sample ballot, which was the same as the ballot distributed on December 8, 1998. "A Pray [sic] for Justice" made reference to workers in underdeveloped countries who work for very low wages and also contained a prayer for an amelioration of those conditions. In addition, it stated, "Do not forget it, the Union is the solution. We have to vote union yes." At the bottom of the document it stated, "Michigan Regional Council of Carpenters Interior Systems Local 1045." The sample ballot was the same as that distributed on December 8, with an "X" marked in the "yes" box. Both documents were double sided with an English version on one side and a Spanish version on the other. The parties stipulated that about 120 of the documents were distributed to employees at that time.

The parties stipulated that in the incidents referred to above on both December 8 and 16, 1998, Musser, Herrara, and Raquepaw identified themselves as union agents to employees as they passed out the literature and that they were wearing jackets, hats, and buttons with union insignia. The parties also stipulated that on both occasions Jose Herrara spoke Spanish to employees and while doing so identified himself as a union agent and advocated a vote for the Petitioner as he handed the documents to the Spanish-speaking employees.

Employer witness Alexander Goralewski, the vice president of finance, testified that about 80 to 85 percent of the Employer's employees are of Hispanic origin. He also testified that five of the employees in the voting unit are illiterate. Employer witness Jose Morales, a supervisory training manager, testified that while about 90 percent of the Hispanic employees are bilingual, about 80 percent of this group have difficulty speaking or reading English. Morales also testified that he saw the sample ballot distributed on December 8 and 16 on two occasions in the plant. He testified that he saw about 40 employees reading the sample ballot distributed by the Petitioner the day before the election.

The parties stipulated that there were four sets of English and Spanish Notices of Election posted at the Employer's facility and that the notices were posted continuously from December 11 through the election on December 17, 1998. The parties also agreed that the wording on both Notices of Election was the same except for the bottom lines which read the entire length of the notice. The English version of the Notice of Election has three lines at the bottom which state, "Warning, this is the only official notice of this election and must not be defaced by anyone. Any markings that you may see on any sample ballot, or anywhere on this notice have been made by someone other than the National Labor Relations Board and have not been put there by the National Labor Relations Board. The National Labor Relations Board is an Agency of the United States Government and does not endorse any choice in the election." The Spanish version of the notice at the same location reads only "Warning, this is the only official notice of this election and must not be defaced by anyone."

The Employer argues that the sample ballot distributed by the Petitioner is likely to have given voters the misleading impression that the NLRB favored the Petitioner. It cites *SDC Investments,* 274 NLRB 557 (1985), in support of its position. The Employer also argues that the Region's Spanish Notice of Election was faulty in that it did not have the disclaimer that any markings on the sample ballot were made by someone other than the NLRB, as the English version did. The Employer also contends that there is evidence through the testimony of Jose Morales, that employees examined the Petitioner's sample ballot within 24 hours of the election.

The Petitioner argues that the sample ballots it distributed were handed out with literature that was clearly campaign propaganda and distributed by individuals who identified themselves as Petitioner agents by their garb and exhortations to vote for the Union. The Petitioner also argues that as both the English and Spanish Notices of Election contain language in the far right panel which states, "The National Labor Relations Board is an Agency of the United States Government and does not endorse and choice in the election," employees would not have been confused that the NLRB endorsed the marking of the sample ballot. The Petitioner also cites *Midland National Life Insurance Co.,* 263 NLRB 127 (1982), and argues that the sample ballot is merely a "misleading impression" and therefore is not the basis for a meritorious objection.

[5] Because the unit is predominately Hispanic, and about 80 percent of unit employees have difficulty reading or speaking English, it is reasonable to infer that these employees could be misled into believing that facsimiles of official Board sample ballots—which facsimiles contain no indication that they were prepared or supplied by a party—are the product of, or reflect the positions of, the Board.

In *SDC Investments*, supra, the Board applied a two-part analysis to determine whether an altered document is misleading. If the altered document clearly identifies its source then the Board will find that the document is not misleading. If the source of the document is not readily identified, the Board will examine the nature and contents of the material to determine whether voters could be misled into believing that the Board favored one party to the election. In the instant matter the sample ballots do not identify the source of the document. However, the sample ballots were distributed with other documents which could clearly be identified as Petitioner campaign propaganda. While the document titled "Contract" does not specifically make reference to the Petitioner, it trumpets the benefits of a collective-bargaining agreement and it could be readily concluded that the author was the Petitioner. The document titled "A Pray [sic] for Justice" clearly makes reference to the Petitioner and states that employees should vote yes. Based on the above, employees receiving the sample ballots could readily conclude that they came from the Petitioner. Furthermore, the sample ballots were distributed by individuals who clearly identified themselves as agents of the Petitioner. The Board has used such criteria to determine that the distribution of an altered ballot did not establish a basis for overturning an election. *Comcast Cablevision of New Haven, Inc.,* 325 NLRB 833 (1998); *Worths Stores Corp.,* 281 NLRB 1191 (1986).

With respect to the contention that the Spanish Notice of Election was faulty, it is undisputed that the Spanish notice did not contain the language now used to inform employees that any markings on the sample ballot were not placed there by the Board. For the reasons set forth above, however, I conclude that the Petitioner did not engage in objectionable conduct. In addition, *Worths Stores Corp.,* supra; *C. J. Krehbiel Co*., 279 NLRB 855 (1986); and *Rosewood Mfg. Co.,* 278 NLRB 722 (1986), are decisions which issued prior to the usage of the disclaimer language now found in Board Notices of Election. In those cases, which involved facts similar to the instant matter, the Board concluded that objectionable conduct involving altered documents had not occurred. Therefore, the absence of the disclaimer language does not automatically establish a meritorious objection in an altered ballot situation.

I therefore recommend that the objections to the election be overruled.